

May 31, 2006

Kent County - Civil Division (739-7641)

Mr. Robert P. Reeder  
131 Hiawatha Lane  
Dover, DE 19904

**RE: Freedom of Information Act Complaint  
Against Capital School District**

Dear Mr. Reeder:

On March 28, 2006, our Office received your letter alleging that the Capital School District ("the School District") violated the public records requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA").

You made a FOIA request for information about a School District employee. The School District responded to your FOIA request by letter dated March 21, 2006. The School District agreed to provide you with the school employee's salary information, but deferred to our Office to determine whether the employee's attendance records and sign-out sheets were public records under FOIA.

By letter dated March 28, 2006, we asked the School District to respond to your FOIA complaint by April 10, 2006. We received the School District's response on April 12, 2006. On

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April 27, 2006, we requested blank samples of the sign-out and dual employment time sheets used by the School District, which we received on May 1, 2006.

### **RELEVANT STATUTES**

FOIA requires that "[a]ll public records shall be open for inspection and copying by any citizen of the State during regular business hours by the custodian of the records for the appropriate public body." 29 *Del. C.* §10003(a).

FOIA exempts from disclosure "[a]ny personnel, medical or pupil file, the disclosure of which would constitute an invasion of personal privacy, under this legislation or under any State or federal law as it relates to personal privacy." *Id.* §10002(g)(1).

FOIA also exempts "[a]ny records specifically exempted from public disclosure by statute or common law." *Id.* §10002(g)(6).

The Health Care Privacy Act, 16 *Del. C.* Chapter12, provides that "[p]rotected health information is not public information as defined at §10002 of Title 29 [FOIA] . . . ." 16 *Del. C.* §1232(a). "Protected health information" is defined as "any information, whether oral, written, electronic, visual, pictorial, physical or any other form, that relates to an individual's past, present or future physical or mental health status, condition, treatment, service, products purchased, or provision of care and that reveals the identity of the individual whose health care is the subject of the information . . . ." *Id.* §1230(4).

### **LEGAL AUTHORITY**

#### **A. Personnel File**

In *Att'y Gen. Op.* 3W-077 (Aug. 4, 1977), our Office determined that FOIA's personnel file exemption did not cover the names, job classifications, and salaries of State employees because disclosure would not "constitute an invasion of personal privacy." 29 *Del. C.* §10002(g)(1).

In *Gannett Co. v. Colonial School District*, Civ.A. No. 82M-DE-26, 1983 WL 473048 (Del. Super., Aug. 19, 1983) (Balick, J.), the Superior Court agreed. "Although some might feel that the amount of their salary is personal, it is generally recognized that the public has a legitimate interest in knowing the salaries of persons who are paid with public funds and public employees have no right of privacy in this information."

In *Att'y Gen. Op.* 3W-023 (Mar. 10, 1978), our Office clarified that while "the gross salary of a state employee is discloseable to the public, the detailed information contained in payroll records such as withholding taxes, social security deductions, elective health care insurance deductions, and other types of elective deductions are not disclosable. Such deductions, whether elective or otherwise, often reflect personal and private matters the disclosure of which could be held to constitute an invasion of personal privacy. . . [S]uch information is not in any way relevant to how a public employee performs his public duties, . . ."

Our Office has not had previous occasion to consider whether a public employee's attendance records or time sheets are exempt from disclosure under FOIA.<sup>1</sup> There are no Delaware cases on point. As we have in the past when presented with a legal issue of first impression, we look to the case law in other jurisdictions for guidance.

1. Federal FOIA

The federal Freedom of Information Act exempts from disclosure "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6) ("Exemption 6").

In *Dobronski v. Federal Communications Commission*, 17 F.3d 275 (9<sup>th</sup> Cir. 1994), a reporter made a FOIA request for sick leave records of an FCC assistant bureau chief after receiving a tip that she had been taking unaccrued sick leave and improperly using sick leave to take paid vacations. The federal district court held that the records were "not the type that Exemption 6 is intended to protect. The documents consist mainly of leave slips and, with the exception of the assistant's social security number, contain no personal information. The leave slips do not describe the reasons why leave was being taken. Thus, the privacy interests in these leave slips is minimal at best." 17 F.3d at 277.

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<sup>1</sup> In *Att'y Gen. Op.* 02-IB24 (Oct. 1, 2002), our Office adopted the Department of Labor's definition of a "personnel file" in 19 *Del. C.* §731(3), which includes "attendance records." In that opinion, we used the DOL's definition to determine that a settlement agreement in employment litigation was not covered by FOIA's personnel file exemption. Attendance records may be part of a public employee's personnel file, but we did not address whether disclosure of attendance records "would constitute an invasion of personal privacy." 29 *Del. C.* §10002(g)(1).

The federal appeals court affirmed "that the records do not contain protected personal medical information." *Id.* at 276. Balanced against the minimal privacy interest, there was a strong public interest in disclosure because a "citizen has a right to investigate whether government officials abuse their offices and the public fisc by improperly using sick leave to take unauthorized paid vacations. . . . Abusing sick leave can be a form of payroll padding that violates the public trust." *Id.* at 278. If the reporter's tip was true, "and a staff member has been taking unaccrued sick leave time, or has abused sick leave to 'moonlight' another job or take inappropriate vacations, the [the reporter] will have uncovered a misuse of public monies. Disclosure of such abuse is in the public interest." *Id.*

The appeals court, however, declined "to hold that sick leave records should be categorically excluded from the scope of Exemption 6." *Id.* "[S]ick leave records could contain information regarding the reasons for an employee's sick leave, or the state of her health. Information regarding illness or health is personal, and falls under the scope of Exemption 6." 17 F.3d at 277-78.

In *Jafari v. Department of the Navy*, 728 F.2d 247 (4<sup>th</sup> Cir. 1984), the plaintiff's civilian employer requested information from the a Marine Corps reserve unit about his attendance at reserve drills and a two-week training program. The federal appeals court held that disclosure of that information did not "constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. §552(b)(6). "The only information released concerned Jafari's absence from reserve drills and training programs and the dates of such absences. No information was released relating to the official nature of those absences, nor to any reasons that may have been assigned for them by Jafari." 728 F.2d at 249.

## 2. Pennsylvania

In *Kanzelmeyer v. Eger*, 329 A.2d 307 (Pa. Cmwlth. 1974), a taxpayer sought to examine payroll registers, payroll vouchers, and attendance records to determine whether the school district paid employees for unexcused and unauthorized absences from work. The school district used pre-printed cards for a principal to record daily attendance information.<sup>2</sup> At the end of each month, the principal delivered the cards to the payroll department to determine whether each employee's salary should be paid in full or docked for days absent.

The Commonwealth Court held that the school district must produce the attendance records. "While a person of even ordinary sensitivity might reasonably desire that the record of his illnesses or deaths in his family be withheld from scrutiny by members of the public, we are unable to agree that the facts of illness or deaths of family members can operate to impair reputation or personal security." 329 A.2d at 310.

Public employment has attractions, including the satisfaction of performing public service and, in the case of professional employees of public schools, protection from dismissal for whimsical reasons or no reason at all. One of the disadvantages of public employment is the requirement of public accountability by both employer and employee. The instant record clearly establishes that the appellant would be unable to ascertain whether the district had paid its employees for unauthorized absences without access to the attendance record cards. The cards are, therefore, plainly the kind of record intended to be made available to public examination by the "Right to Know Law." Consider-

2 The pre-printed cards had sections to record the following information:

Name of Employee	M	T	W	T	F	Sick Leave	Dr. Cert.	Death Family	General Remarks
						Accu. Used	Left	Immediate	Near R

ations of privacy and confidentiality, as distinguished from regard for reputation and personal security, must yield to the public's right to know about and examine into its servants' performance of duty.

329 A.2d at 310.<sup>3</sup>

3. Massachusetts

In *Brogan v. School Committee of Westport*, 516 N.E.2d 159 (Mass. 1987), the Westport board of selectmen repeatedly asked the school committee to release individual employee absentee records. The school committee first produced summaries of the absentee records, and then the records themselves with the names of the employees deleted. The school committee relied on the exemption in the state public records law for "personnel files." Mass.Gen.Laws c.4, §7.

The Supreme Judicial Court of Massachusetts ordered the school committee to produce the unredacted absentee records because they were not of a personal nature. "The selectmen seek information only as to the names of the school committee's employees, and the dates and generic classifications, e.g., 'sick day,' 'personal day,' etc., of their absences. These are not 'intimate details' of a 'highly personal nature,' the 'kind of private facts that the Legislature intended to exempt from mandatory disclosure.'" *Brogan*, 516 N.E.2d at 160 (quoting *Globe Newspaper Co. v. Boston Retirement Board*, 446 N.E.2d 1051, 1056 n.13 (Mass. 1983) (quoting *Hastings & Sons Publishing*

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<sup>3</sup> In *Kanzelmeyer*, the lower court expressed concern that on the time cards "under the heading 'General Remarks' the employee's superior might record the fact that an absence was the result of 'suspension for disciplinary reasons.'" 329 A.2d at 310. The Commonwealth Court found "nothing in the record establishing that in fact a disciplinary action has ever been recorded on attendance record cards, much less that the cards for May and June of 1972 contained such information." *Id.*

*Co. v. City Treasurer of Lynn*, 375 N.E.2d 299, 304 (Mass. 1978)).<sup>4</sup>

4. Connecticut

The Connecticut Freedom of Information Act exempts "personnel or medical files . . . the disclosure of which would legally constitute an invasion of privacy." Conn.Gen.Stat. §1-19(b)(2).

In *Perkins v. Freedom of Information Commission*, 635 A.2d 783 (Conn. 1993), a taxpayers association made a FOIA request to a city board of education for the sick leave records of a school psychologist. The request was "limited to records concerning the [psychologist's] sick pay rather than information about the nature of her illness or the state of her health." 635 A.2d at 785. The Connecticut Supreme Court held that "a request for numerical data dealing with a public employee's sick leave records" did not constitute an invasion of personal privacy.

We note that when a person accepts public employment he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties. The public has a right to know not only who their public employees are, but also when their public employees are and are not performing their duties.

635 A.2d at 792.

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<sup>4</sup> In *Hastings*, the court held that overtime pay disbursements to police officers for off-duty or special duty work details was public information. The court rejected the officers' argument that disclosure would violate the confidentiality of tax returns, Mass.Gen. Laws c. 62, s.21. "We find no conflict between the legislative policies to disclose city payroll records and the confidentiality of tax returns; payroll records and tax returns have different purposes and reveal different facts about the individual." 375 N.E.2d at 305 n.10. *But see Att'y Gen. Op.* 95-IB13 (Mar. 20, 1995) (newspaper withdrew its FOIA request that school district salary information "be provided from the Federal W-2 form salary total 1994 for each teacher. This was in apparent response to the school district's citation to 30 Del. C. §368(a) as a statutory basis for refusing to produce the records in question.").

5. Iowa

The Iowa open records law exempts from disclosure "[p]ersonal information in confidential personnel records of public bodies." Iowa Code §22.7(11).

In *Clymer v. City of Cedar Rapids*, 601 N.W.2d 42 (Iowa 1999), a newspaper sought information about city employees' sick leave use and compensation. The Iowa Supreme Court held that "there is an obvious relationship between disclosure of leave records and the public's right to know how its money is spent. . . . [T]he compensation allocated to – and used by – individual public employees, whether for salary, sick leave or vacation, is a matter of legitimate public concern to the public. So long as the information disclosed does not reveal personal medical information conditions or professional evaluations, the public has a right to examine it." 601 N.W.2d at 47, 48.

The lower court ordered the sick leave records disclosed in aggregate form without tying them to an individual's name, but the Iowa Supreme Court reversed that portion of the order. "It is conceivably impractical for the public to decipher from an aggregate pool of sick leave and other leave information whether an individual is misusing or abusing benefits." 601 N.W.2d at 47.

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<sup>5</sup> The Iowa Supreme Court affirmed the lower court's decision to redact the gender, address, and birth date information from the sick leave records. "Employees serving in the public sector have a legitimate interest in avoiding unwanted contacts at their homes by protecting this information from public dissemination. As counsel for the firefighters aptly stated, public employees 'deal with people who don't necessarily have the same boundaries as people sitting in this courtroom.'" 601 N.W.2d at 48. "The [newspaper's] expressed need to 'avoid confusion and verify identification' fails to outweigh the safety and security issues implicated by the revelation of these personal details." *Id.*

6. Mississippi

The Mississippi Public Records Act exempts from disclosure "personnel records in the possession of a public body." Miss.Code.Ann. §25-1-100(1).

In *Mississippi Department of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enforcement Officers' Association*, 740 So.2d 925 (Miss. 1999), the union made a public records request for the names and accumulated compensatory time for each employee of the department as of July 1, 1996. The Mississippi Supreme Court held that the department must disclose the information. "It is important to note that the Association's request was narrowly drawn. It did not seek the underlying personnel records concerning the reasons that comp time was accumulated by a particular employee, nor the reasons a particular employee used or did not use his or her comp time. Rather, the Association sought only a list of the Department employees with each individual's comp time as of July 1, 1996. Thus, even assuming that some privacy interest was at stake, there was no possible intrusion into that area by the Association's request." *Id.* at 936.

The Mississippi Supreme Court distinguished aggregate compensatory time from other personal employment information that was exempt from disclosure "such as the net salary information or exemptions of a public employee" and "records reflecting a public employee's pension and/or medical benefits." 740 So.2d at 933. The court noted that the state attorney general had determined that leave time records of public school teachers were public information "because the public's right to know how many times a public employee misses work arguably outweighs that employee's privacy interests in keeping such information confidential." *Id.* at 934 (citing A.G. Op. #92-0379 (May 20, 1992)). The department contended that "comp time is different because it is

earned, and as such depends on the personal work habits of the individual public employee. However, this argument is flawed. Both situations, leave time and comp time, deal with the work habits of an employee and are earned by the employee." *Id.*

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In light of this overwhelming weight of authority, we believe that the courts in Delaware would hold that the personnel file exemption under Delaware's FOIA does not exempt from disclosure the attendance records or time sheets of a public employee because disclosure would not "constitute an invasion of personal privacy." 29 *Del. C.* §10002(g)(1). Just as the public has a right to know the salary paid to public employees, the public also has a right to know when their public employees are and are not performing the duties for which they are paid.

We do not believe that disclosure of the names, dates, and generic classifications like "vacation," "sick day," or "personal day" would constitute an invasion of personal privacy. Public employees should know when they accept public employment that they become accountable to the public with regard to their salary and the dates and times they are on the job.

We agree with the authorities in other jurisdictions, however, that a public body may redact from the attendance records or time sheets of a public employee information regarding the specific nature of his or her illness or medical treatment or the name of the doctor.

The School District provided us with two blank forms. The first, "Sign Out Sheet for Teachers – Dover High School" has a space for "Date \_\_\_\_\_" and then four columns: NAME DESTINATION TIME OUT TIME RETURNED. The second form, "Capital School District – Dual Employment Time Sheet," has blocks for Employee Name, Weekly Dates Reported From:

\_\_\_\_ To: \_\_\_\_\_ and then four columns (Date, Time Left Building, Time To Be Deducted From Paycheck, Adjustment Column), followed by date/signature lines for the Employee, Administrator, and Business Manager.

We determine that a School District employee's dual employment time sheets are not covered by FOIA's personnel file exemption because disclosure of the information in those time sheets would not "constitute an invasion of personal privacy." 29 *Del. C.* §10002(g)(1). We also determine that a School District employee's sign out sheets are not covered by FOIA's personnel exemption with the possible exception of information in the column DESTINATION. If the information in that column would reveal a specific medical condition or course of treatment or the doctor's name, then the School District should redact that information before making the sign out sheets available to the public.

B. Health Care Privacy Act

The Health Care Privacy Act ("the HCPA") provides: "Protected health information is not public information as defined at §10002(g) of Title 29 . . . ." 16 *Del. C.* §1232(a). Information protected by the HCPA therefore is exempt from disclosure under FOIA as "records specifically exempted from public disclosure by statute or common law." 29 *Del. C.* §10002(g)(6).

The HCPA defines "protected health information" to include "any information, . . . that related to an individual's past, present or future physical or mental health care status, condition, treatment, . . . and that reveals the identity of the individual. . . ." 16 *Del. C.* §1230(4).

In *Lawson v. Meconi*, No. 252, 2005 , 2006 WL 851179 (Del., Apr. 6, 2006) (en banc), the

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Delaware Supreme Court held that the HCPA prohibited disclosure by the Medical Examiner of an autopsy report because it would reveal "the details of [the decedent's health condition] by certifying "the person's cause of death." 2006 WL 851179, at p.6. We do not believe that *Lawson* or the HCPA can be read to protect generic information in her sign-out sheets such as "doctor's appointment" or "sick leave." Such generic information does not reveal an intimate or personal details of a medical condition or course of treatment.

To read the HCPA so broadly as to protect generic sick leave information would make it impossible for the public to know whether a particular public employee might be misusing or abusing benefits, an important public interest under FOIA. We believe that the two statutes – HCPA and FOIA – must be construed *in pari materia* to strike a balance between a public employee's right to personal privacy about his or her specific medical condition or course of treatment, and the strong public interest in government accountability for the spending of taxpayer dollars for public employee salary and benefits.

We determine that the HCPA does not protect generic information in a School District employee's sign-out sheets such as "doctor's appointment." Like FOIA's personnel file exemption, we believe that the HCPA does protect any more specific information in a School District employee's sign-out sheets which might reveal a specific medical condition or course of treatment or name of the doctor.

### **CONCLUSION**

For the foregoing reasons, we determine that the School District must make available to you:

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(1) the School District employee's dual employment time sheets for the dates you requested; and (2) the School District employee's sign-out sheets for the dates you requested. The School District may redact information in the sign-out sheets in the column under DESTINATION to the extent that disclosure would reveal a specific medical condition or course of treatment or name of the doctor.

We direct the School District to make those records available to you for inspection and copying within ten days of the day of this letter. The School District may redact those records to protect any personal health information in accordance with this opinion. We direct counsel for

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the School District to report back to us in writing within ten days after the School District has remediated.

Very truly yours,

W. Michael Tupman  
Deputy Attorney General

APPROVED

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